Supreme Court, U.S.
FILED

01 565 SEP 27 2001

OFFICE OF THE CLERK

No. _____

# In the Supreme Court of the United States

AMERICAN MULTI-CINEMA, INC.,

*Petitioner,*

v.

CITY OF WARRENVILLE,

*Respondent.*

**Petition for a Writ of Certiorari to the Appellate Court of Illinois**

## PETITION FOR A WRIT OF CERTIORARI

CHARLES ROTHFELD
*Mayer, Brown & Platt*
*1909 K Street, N.W.*
*Washington, D.C. 20006*
*(202) 263-3000*

JAMES C. SCHROEDER
*Counsel of Record*
DANIEL J. DELANEY
ALLAN H. ERBSEN
*Mayer, Brown & Platt*
*190 South LaSalle Street*
*Chicago, Illinois 60603*
*(312) 782-0600*

*Counsel for Petitioner*

7pp

## QUESTIONS PRESENTED

Respondent city adopted an "amusement tax" that applies to petitioner's movie theater. The tax purports to cover many other "amusements" — such as circuses, rodeos, and "animal acts" — but none of these exists in the city. As the city knew, petitioner's theater is virtually the only entity subject to the tax. The city collects more than 99% of all tax revenues from petitioner. Nonetheless, the Illinois courts held that the tax's theoretical applicability to non-existent entities such as rodeos and carnivals exempted it from strict First Amendment scrutiny and warranted mere rational basis scrutiny. The Illinois decision conflicts with decisions on theater taxes from California and Ohio that themselves conflict: strict scrutiny applies in California, intermediate scrutiny applies in Ohio, and rational basis scrutiny applies in Illinois.

The questions presented are:

1. Whether an "amusement tax" that falls almost entirely (more than 99%) on a single actor engaged in protected speech is subject to strict First Amendment scrutiny under *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Leathers* v. *Medlock*, 499 U.S. 439 (1991).

2. If strict scrutiny does not apply, whether the alternative is intermediate scrutiny rather than mere rational basis scrutiny.

## RULE 29.6 STATEMENT

Petitioner American Multi-Cinema, Inc., is a wholly owned subsidiary of AMC Entertainment, Inc., which is a publicly held company. No publicly held company owns more than 10% of the stock in AMC Entertainment, Inc.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

RULE 29.6 STATEMENT ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT ..... 2

A. Taxes on First Amendment Actors ..... 2

B. Factual Background ..... 3

1. *Adoption of the Tax* ..... 3

2. *Terms of the Tax* ..... 4

3. *Implementation of the Tax* ..... 5

4. *The Present Suit* ..... 6

REASONS FOR GRANTING THE PETITION ..... 7

I. STATE COURTS ARE DIVIDED ON THE PRECISE QUESTIONS PRESENTED HERE ... 10

**TABLE OF CONTENTS—Continued**

II. AMBIGUITY ABOUT WHETHER *MINNEAPOLIS STAR* AND *LEATHERS* FOCUS ON PRACTICAL OR FORMAL CONCERNS HAS CAUSED SUBSTANTIAL CONFUSION ..... 12

A. This Court's Precedents Appear To Announce A Practical, Substance-Focused Rule That Taxes Paid Almost Exclusively By A Single First Amendment Actor Are Subject To Strict Scrutiny ..... 13

B. In Spite Of The Court's Practical Analysis, Some Of Its Language Creates Ambiguity About The Scope Of Its Holdings ..... 18

C. This Case Is The Ideal Vehicle For Resolving The Conflict Among Lower Courts—And Ambiguity Within This Court's Subsequent Decisions—About The Scope Of *Minneapolis Star* And *Leathers* ..... 19

III. IF STRICT SCRUTINY DOES NOT APPLY, THERE IS AN OPEN AND IMPORTANT QUESTION ABOUT WHETHER THE ALTERNATIVE SHOULD BE INTERMEDIATE SCRUTINY OR RATIONAL BASIS SCRUTINY ..... 22

**TABLE OF CONTENTS—Continued**

IV. THE APPELLATE COURT'S HOLDING CREATES IMMENSE POTENTIAL FOR MISCHIEF ..... 25

A. The Appellate Court's Reliance On "General Applicability" Exalts Form Over Substance And Sets A Dangerous Precedent For First Amendment Freedoms ..... 25

B. The Court Should Address Taxes On First Amendment Activities Before Governments And Courts Rely On The Decision Below ..... 26

C. Review Is Necessary Given The Fragility Of The Speech At Issue, The Potential For Censorship, And The Likelihood That Tax Burdens On Speech Will Otherwise Evade Judicial Scrutiny ..... 28

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Alexander* v. *United States*, 509 U.S. 544 (1993) ..... 20

*American Oil Co.* v. *Neill*, 380 U.S. 451 (1965) ..... 21

*Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986) ..... 20

*Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) ..... 14, 16, 17, 18

*BellSouth Corp.* v. *FCC*, 144 F.3d 58 (D.C. Cir. 1998) .. 19

*Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996) ..... 21

*Buckley* v. *Valeo*, 424 U.S. 1 (1976) ..... 23

*Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181 (4th Cir. 1994), vacated, 516 U.S. 415 (1996) .. 20

*City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993) ..... 25

*City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986) ..... 23

*Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991) ..... 24

*Edenfield* v. *Fane*, 507 U.S. 761 (1993) ..... 25

**TABLE OF AUTHORITIES—Continued**

*Festival Enters., Inc.* v. *City of Pleasant Hill*, 227 Cal. Rptr. 601 (App.), review denied (Cal. 1986) .... 10, 11

*Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995) ... 24

*Freedman* v. *Maryland*, 380 U.S. 51 (1965) ..... 28

*Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175 (1st Cir. 1996) ..... 20

*Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) ..... 13, 14, 16, 17, 18

*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) ..... 3

*Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) ..... 23

*Leathers* v. *Medlock*, 499 U.S. 439 (1991) ..... *passim*

*Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) ..... 23

*Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) ..... 23

*Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) ..... 28

**TABLE OF AUTHORITIES—Continued**

*Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ..... *passim*

*NAACP* v. *Alabama*, 357 U.S. 449 (1958) ..... 21

*National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) ..... 10

*Near* v. *Minnesota*, 283 U.S. 697 (1931) ..... 20

*Regal Cinemas, Inc.* v. *City of Mayfield Heights*, 738 N.E.2d 42 (Ohio App.), appeal denied, 731 N.E.2d 1141 (Ohio 2000), cert. denied, 121 S. Ct. 880 (2001) ..... 10, 11

*Roaden* v. *Kentucky*, 413 U.S. 496 (1973) ..... 3

*Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) ... 3

*Schneider* v. *New Jersey*, 308 U.S. 147 (1939) ..... 21

*Service Employees Int'l Union* v. *Fair Political Practices Comm'n*, 955 F.2d 1312 (9th Cir. 1992) ..... 20

*Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) ..... 14

*Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994) ..... 3, 20, 24

**TABLE OF AUTHORITIES—Continued**

*Turner Broad. Sys., Inc.* v. *FCC*,
520 U.S. 180 (1997) ..... 25

*Turner* v. *Safley*, 482 U.S. 78 (1987) ..... 23

*United Artist Theater Circuit, Inc.* v. *City of New Orleans*,
1996 WL 46709 (E.D. La. Feb. 5, 1996) ..... 10

*United Artists Communications, Inc.* v. *City of Montclair*,
257 Cal. Rptr. 124 (App.), review denied (Cal.), cert.
denied, 493 U.S. 918 (1989) ..... 10, 11, 19

*United States* v. *National Treasury Employees Union*,
513 U.S. 454 (1995) ..... 20, 28

*United States* v. *O'Brien*, 391 U.S. 367 (1968) ..... 24

*Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989) .. 23, 24

**Statutes**:

28 U.S.C. § 1257(a) ..... 1

28 U.S.C. § 1341 ..... 8, 10

Edwardsville, Illinois, Ordinance No. 5321-6-D1 ..... 27

## TABLE OF AUTHORITIES—Continued

**Miscellaneous:** **Page**

Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus The Desire to Sanitize Society*, 33 WM. & MARY L. REV. 741 (1992) ..... 29

Pat Clawson, *Village Repeals Tax on Movie Theater to Avoid a Lawsuit*, Chi. Trib., Nov. 8, 1996 , at 2 ..... 27

R. A. Hutchinson, *City Could Raise Tax on Hotel*, L.A. Daily News, Sept. 17, 1994, at TO1 ..... 27

Charlie Lanter, *Character First Panel Targets Movies*, Peoria J. Star, Aug. 6, 1999, at A1 ..... 29

Alf Siewers, *Suburb Board Votes to Bar Jesus Film—Sight Unseen*, Chi. Sun-Times, July 21, 1988, at 26 ..... 29

Nicole Sperling, *Regal Lays Out Its Bankruptcy, Recovery Plans*, Hollywood Rptr., Sept. 7, 2001 ..... 28

James Strong, *Aldermen Take Time Out to Put On a Morality Play*, Chi. Trib., Mar. 26, 1986, at 2 ..... 29

## PETITION FOR A WRIT OF CERTIORARI

---

Petitioner American Multi-Cinema, Inc. ("AMC"), respectfully petitions for a writ of certiorari to review the judgment of the Illinois Appellate Court in this case.

## OPINIONS BELOW

The decision of the Illinois Appellate Court (App., *infra*, 1a-14a) is reported at 321 Ill. App. 3d 349 and 748 N.E.2d 746. The order of the Illinois Supreme Court denying discretionary review (App., *infra*, 15a) is reported at 195 Ill. 2d 575. The written judgment and oral ruling of the Circuit Court for DuPage County are unreported, and are set forth below (App., *infra*, 16a-19a).

## JURISDICTION

The judgment of the appellate court was entered on April 27, 2001. The Illinois Supreme Court denied discretionary review on June 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The Fourteenth Amendment to the United States Constitution, which incorporates the First Amendment, provides in pertinent part that "No State shall * * * deprive any person of life, liberty, or property without due process of law." The full text of Warrenville Ordinance No. 1566 is set forth below at App., *infra*, 20a-28a.

## STATEMENT

### A. Taxes On First Amendment Actors

First Amendment actors must pay taxes just like everybody else. The issue here is whether they must pay taxes paid by nobody else. In particular, this case concerns the level of First Amendment scrutiny that should apply to a tax that falls almost exclusively — more than 99% — on a single actor engaged in constitutionally protected speech.

This Court's decisions do not provide a clear answer to that question when, as here, the tax is broad in theory, but narrow in actual application. Indeed, the facts of this case expose substantial tension between First Amendment decisions that require exacting scrutiny of legislation based on its practical effect, and decisions that impose minimal scrutiny based on the legislation's formal language. Here, whether the proper focus is on form or substance is dispositive of what standard of scrutiny should apply.

Under the reasoning of *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Leathers* v. *Medlock*, 499 U.S. 439 (1991), strict scrutiny should apply because a tax paid almost entirely by a lone First Amendment actor creates a risk that the state will use its taxing power as a lever to obtain indirect power over the content of the taxpayer's speech that it could never obtain directly. Yet some courts have construed *Minneapolis Star* and *Leathers* as permitting less stringent scrutiny of taxes that have broad theoretical applicability, even if the tax actually applies to only one taxpayer. The ambiguity in this Court's precedent is so pronounced that three states have applied three different levels of First Amendment scrutiny to the same fact pattern: a municipal amusement tax that purportedly applies to a wide variety of businesses, but in fact is imposed largely on movie theaters. In other contexts, this Court and the federal courts of

appeals have likewise advanced conflicting interpretations of *Minneapolis Star* and *Leathers*.

In the present case, the Illinois Appellate Court, *sua sponte*, adopted the most deferential standard — rational basis scrutiny — which is almost never used in speech cases. The court refused to apply any form of heightened First Amendment scrutiny because Warrenville's tax — referred to by its drafters as the "AMC Amusement Tax" — is in theory "generally" applicable to such non-existent activities as rodeos and carnivals. App., *infra*, 9a-10a. The holding thus allows governments to escape meaningful judicial review by cloaking a narrow tax with broad language.

**B. Factual Background**

1. *Adoption of the Tax.* AMC owns and operates movie theaters throughout the country, and, as Warrenville admits, "is engaged in a continuous exhibition of a wide array of various motion pictures presenting numerous expressions of ideas to its viewers." C. 454.[1] In 1996 and early 1997, AMC finalized plans to construct a 30-screen cinema — the AMC Cantera 30

---

[1] Movie theaters are "presumptively under the protection of the First Amendment." *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973); see also *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("[e]ntertainment," including "motion pictures," "fall[s] within the First Amendment guarantee"); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952) ("It cannot be doubted that motion pictures are a significant medium for the communication of ideas"); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994) (First Amendment protects "editorial discretion" of content providers) (citation omitted); see also *id.* at 675 (O'Connor, J., concurring in part and dissenting in part) ("Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place").

— in Warrenville (a small town 30 miles west of Chicago). C. 734-735. Until that time, Warrenville did not tax amusements and there were no other movie theaters in the city. C. 249, 456. After AMC announced that it would open the Cantera 30 cinema, Warrenville promptly took steps to tax AMC. C. 476-477, 593.

The proposed tax was officially called an "Ordinance Creating an Amusement Tax and Amending the City Code in Accordance Therewith." App., *infra*, 20a. However, some city council members had an informal name for it. At least one alderman called it the "AMC Entertainment Tax," C. 751, and in a written public statement the mayor called it the "AMC amusement tax." C. 738.

The city council adopted the tax in March 1997, but delayed its effective date by nine months, until January 1998. C. 260. A few small local businesses were engaged in taxable activities during the tax's nine-month hibernation, but AMC was not scheduled to open until January 1998. C. 249-250, 477, 493, 502.

2. *Terms of the Tax.* The amusement tax imposes a 5%[2] gross receipts tax on admission fees for "amusements," which are defined as:

> Any and all spectator and exhibitive entertainment, including but not necessarily limited to the following activities: any movie; theatrical, dramatic, musical or spectator performance; carnival; circus; rodeo; animal

---

[2] The tax rate was initially 2%, but the city more than doubled it to 5% three days after AMC filed its opening brief in the appellate court. See AMC Reply Br. at A.17. The amenability of the tax to being increased by 150% in a single stroke illustrates its immunity from the normal political safeguards that constrain manipulation of taxes. See *infra* pages 17-18.

> act; amusement ride; amusement attraction; game; or animal show.

App., *infra*, 21a. The ordinance exempts "coin operated amusement device[s]" and amusements conducted by government entities on government-owned property. *Id.* at 22a-23a. A taxpayer may pay the tax either by subtracting it from gross receipts, or by charging it directly to customers as a separate addition to the admission fee. *Id.* at 22a. To remain competitive with ticket prices charged by theaters in surrounding communities without such a tax, AMC pays the tax from revenues as an operating expense, rather than charging it as a supplement to the ticket price. C. 485, 742.

3. *Implementation of the Tax.* AMC has paid more than 99% of the amusement taxes that Warrenville has collected from the inception of the tax through April 1999 (the last month for which there is data in the record). C. 724.[3] For the first nine months of the tax's existence, AMC was the only entity to pay any tax. A few other entities were engaged in taxable activities throughout that period, but did not pay the tax. C. 249-250.

Warrenville began enforcing the tax against other entities only after AMC threatened to sue. In October 1998, AMC informed Warrenville that it was considering suing the city because the amusement tax was unconstitutional, in part because AMC was the only entity paying it. C. 289-290. A few days later, the city wrote to the Acorn Coffee Bar — which city officials had known was engaged in taxable activity since the inception of the ordinance, C. 477, 493, 502, 734 — to "remind" it to pay the tax. C. 291. The city later notified four additional businesses that taxes might be due: the Avalanche

---

[3] Nothing in the record suggests any subsequent change in the ratio of AMC's payments to the payments of other businesses.

Sports Bar, the Corner Cue pool hall, the Satisfied Frog bar, and Big Band Dance. C. 99, 293-294, 296, 701. These entities then paid retroactive taxes. C. 249-250, 724.

AMC continued to account for virtually all of Warrenville's amusement tax revenues even after other businesses began paying. For example, for July 1998, AMC paid $20,828.92, while Acorn retroactively paid $8.08 and Big Band retroactively paid $2.20. C. 724. Aside from AMC, only five businesses have ever paid any amusement tax; one has never paid more than $4.10 in any month, and two did not pay any taxes in 1998. *Ibid.*

In the 15-month period between January 1998 and April 1999, AMC paid $188,642.70 in amusement taxes, while all other taxpayers combined paid $803.19. C. 724. AMC thus paid 99.58% of all amusement taxes that Warrenville collected.

4. *The Present Suit.* AMC sued Warrenville in January 1999 in the Circuit Court of DuPage County, Illinois. Count I of the amended complaint sought a declaration that the amusement tax violated the First Amendment and an injunction against further collection of the tax, while count II sought a refund of all amusement taxes collected from AMC. C. 83-85.

Both AMC and Warrenville moved for summary judgment. C. 147, 229. AMC argued that the amusement tax should be subject to strict scrutiny because it almost exclusively burdens a single actor engaged in constitutionally protected speech, such that Warrenville has acquired leverage over AMC's decisions about the content that it will provide to audiences. C. 239-240. Warrenville argued that the tax on its face is content-neutral and generally applicable, and therefore subject to intermediate judicial scrutiny. C. 185-187. Warrenville never contended that its tax could survive strict scrutiny.

The circuit court granted Warrenville's motion for summary judgment and denied AMC's motion. The court held that "the highest level of scrutiny" was inappropriate because the amusement tax "is fairly broad in its definition of amusement," and is "content-neutral." App., *infra*, 19a. The court rationalized the fact that AMC accounted for more than 99% of amusement tax revenues by attributing it to "forces of the marketplace" that were of no constitutional significance. *Ibid.* After concluding that strict scrutiny was inapposite, the court upheld the amusement tax without articulating what lower level of scrutiny it was applying, although the brevity of the court's one-sentence analysis suggests that the standard was minimal. *Ibid.*; see also App., *infra*, 12a (statement by appellate court that "it is not clear what level of scrutiny the trial court did apply").

The Illinois Appellate Court for the Second District affirmed the circuit court's conclusion that strict scrutiny did not apply, but went further and held what even Warrenville had never argued: that intermediate scrutiny also did not apply. App., *infra*, 12a-13a. Instead, the court held that the amusement tax did not raise *any* First Amendment questions and was therefore subject to only rational basis scrutiny, which it survived. *Ibid.* The court reasoned that Warrenville's tax was "broad," and therefore immune from heightened scrutiny, because it applied "generally to all amusements" even though other amusements did not actually exist. *Id.* at 9a-10a.

The Illinois Supreme Court declined to review the appellate court's order. App., *infra*, 15a.

## REASONS FOR GRANTING THE PETITION

The appellate court's disturbing opinion warrants review for several reasons. *First*, the opinion conflicts squarely with decisions from other states. The same fact pattern — theoretically broad but actually narrow amusement taxes on

movie theaters — has prompted the courts of three different states to apply three different levels of First Amendment scrutiny to identical constitutional challenges based on the same line of this Court's precedents. Strict scrutiny applies in California, intermediate scrutiny applies in Ohio, and rational basis scrutiny applies in Illinois. The disagreement on this recurring question — which arises exclusively in state courts because the Tax Injunction Act (28 U.S.C. § 1341) bars federal courts from enjoining state and local taxes — creates uncertainty for local governments and First Amendment actors and warrants a definitive answer from this Court.

*Second*, this case also starkly highlights ambiguity within this Court's First Amendment jurisprudence. The appellate court dismissed the need for strict scrutiny by distinguishing *Minneapolis Star* and *Leathers* on grounds that raise a question about whether those cases require practical assessment of a tax's actual effect, or merely a formal analysis of legislative language disguising that effect. This Court's post-*Minneapolis Star* statements on this point have been inconsistent, alternatively focusing on the practical and formal aspects of the tax. Lower court decisions reflect the unsettled state of the law: ambiguity about the meaning of *Minneapolis Star* and *Leathers* has divided both the state courts (in amusement tax cases) and federal appellate courts (in other contexts). The form versus substance debate that is at the heart of these conflicting lower court decisions is central to First Amendment law.

*Third*, it is also not clear from this Court's precedents when intermediate scrutiny applies in lieu of rational basis scrutiny. One long line of cases holds that heightened scrutiny almost always applies to colorable First Amendment claims, while another line applies rational basis scrutiny to generally applicable taxes. Here, the challenged tax is in theory generally applicable, but also raises a serious First Amendment claim. The petition thus provides an opportunity for the Court to

reconcile two lines of its precedents and provide sorely needed guidance for the divided lower courts.

*Finally*, review is also warranted because the appellate court's interpretation of the First Amendment — exalting form over substance — creates enormous potential for mischief that is otherwise likely to escape judicial scrutiny. If a thin veneer of breadth is sufficient to shield an otherwise suspicious tax from meaningful First Amendment review, then local governments have a powerful weapon against speech. By the simple artifice of converting a narrow "AMC tax" into a seemingly broad "amusement tax" — even though there is no functional difference between them — Warrenville has been allowed to escape rigorous judicial scrutiny. The city — and any other municipality that follows its example — can use its taxing power as a lever to manipulate fragile speech in ways that are unlikely to result in litigation and that will therefore escape judicial review. This is not a theoretical danger: as we note below, municipalities in Illinois and elsewhere have taken action to discourage the exhibition of disfavored motion pictures. Granting the petition would afford the Court an opportunity to preempt such mischief by deciding whether municipalities should be allowed to acquire the leverage over speech created by taxes that, in practice, fall almost exclusively on First Amendment actors.

This case is an ideal vehicle for resolving these issues. The uncontested facts present the legal issues as purely as possible: AMC is subject to a tax with indisputably broad language, but an indisputably narrow operating incidence. The fact that AMC pays more than 99% of the tax is either dispositive or irrelevant. The fact that the tax applies to such non-existent activities as rodeos and "animal acts" is either a meaningless fig leaf or a salient distinction. These stark contrasts squarely present the recurring question of which standard of First Amendment scrutiny should apply to taxes imposed largely on

First Amendment actors. In light of the split among state courts, the importance of the questions presented, the tension within controlling doctrine, and the potential for legislative abuse if courts and governments follow the path taken below, the petition should be granted.

## I. STATE COURTS ARE DIVIDED ON THE PRECISE QUESTIONS PRESENTED HERE

The constitutionality of a state or local tax on movie theaters is an issue that arises only in state courts. See 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State"); *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 586-587 (1995) (discussing scope of Tax Injunction Act); *United Artist Theater Circuit, Inc.* v. *City of New Orleans*, 1996 WL 46709 (E.D. La. Feb. 5, 1996) (dismissing under Tax Injunction Act movie theater's challenge to municipal amusement tax). State courts have taken conflicting positions on the questions presented by this petition.

In California, an ostensibly broad amusement tax that falls almost exclusively on a single movie theater is subject to strict First Amendment scrutiny. *Festival Enters., Inc.* v. *City of Pleasant Hill*, 227 Cal. Rptr. 601 (App.) (addressing amusement tax paid only by the plaintiff movie theaters), review denied (Cal. 1986); *United Artists Communications, Inc.* v. *City of Montclair*, 257 Cal. Rptr. 124 (App.) (addressing challenge to admissions tax where two theaters and two book stores accounted for 90% of tax revenues), review denied (Cal.), cert. denied, 493 U.S. 918 (1989). In Ohio, such a tax is subject to intermediate scrutiny. *Regal Cinemas, Inc.* v. *City of Mayfield Heights*, 738 N.E.2d 42, 47 (Ohio App.) (addressing challenge to various amusement taxes where movie

theater paid between 88% and 100% of the tax), appeal denied, 731 N.E.2d 1141 (Ohio 2000), cert. denied, 121 S. Ct. 880 (2001). And in Illinois, it is subject to rational basis scrutiny. App., *infra*, 13a. The choice of standard will often determine the outcome of the constitutional challenge: amusement taxes were invalidated in California, while essentially identical levies were upheld in Ohio and Illinois.

The various state court decisions addressing amusement taxes take opposite positions on pivotal questions, yet each relies on the same line of this Court's precedents. Compare *Regal*, 738 N.E.2d at 48 (narrowly applicable tax avoids strict scrutiny because it in theory applies to "numerous activities," such as "circuses"), with *United Artists*, 257 Cal. Rptr. at 128 (strict scrutiny applies "despite [the tax's] broadly worded applicability"). While the appellate court here held that rational basis scrutiny applies because AMC "just happens to be" the only entity subject to taxation (App., *infra*, 11a), a California court rejected precisely this argument, holding that the inclusion of non-existent taxpayers within the tax definition is "illusory" and cannot shield the "impact" of the tax from scrutiny, *Festival Enters.*, 227 Cal. Rptr. at 603.

The variation among state courts on the identical federal question, especially one where there is no original federal jurisdiction, warrants review by this Court to ensure that states treat federal constitutional claims consistently. There is no reason to wait: the split is already well-developed — indeed, the various state courts have already adopted every conceivable level of scrutiny — and delay would only create uncertainty for local governments and First Amendment actors without assisting the Court's eventual resolution of the issue. Instead, this case — which involves stark and undisputed facts — is an ideal vehicle for clarifying an area of law that state courts have interpreted in widely diverging ways.

## II. AMBIGUITY ABOUT WHETHER *MINNEAPOLIS STAR* AND *LEATHERS* FOCUS ON PRACTICAL OR FORMAL CONCERNS HAS CAUSED SUBSTANTIAL CONFUSION

The divergent positions among state courts mirror confusion among federal courts about whether *Minneapolis Star* and *Leathers* reflect concern about the practical effect of state taxes or more formal distinctions drawn by such taxes. Indeed, even this Court's subsequent characterizations of *Minneapolis Star* and *Leathers* are not entirely consistent.

On one view, *Minneapolis Star* and *Leathers* hold that a tax should be judged based on its actual operating incidence, and be subject to strict scrutiny if it falls almost exclusively on a single First Amendment actor. But under a competing view, which the appellate court adopted, these precedents apply only when a tax facially "singles out" the media for special treatment. A tax is thus judged based on what it pretends to do, rather than what it actually does.

This conflict cuts to the core of First Amendment jurisprudence, raising critical questions about the competing roles of form and substance. As explained below, if one takes the reasoning of *Minneapolis Star* and *Leathers* seriously, then strict scrutiny clearly applies because the practical effect of Warrenville's tax threatens the First Amendment values discussed in those cases. But if one reads those cases as applying only when a statute formally singles out a First Amendment actor, then Warrenville's amusement tax does not raise the red flag that it otherwise would.

The following pages show how the interpretative confusion over *de jure* and *de facto* burdens on speech arises and why the Court should resolve it now.

### A. This Court's Precedents Appear To Announce A Practical, Substance-Focused Rule That Taxes Paid Almost Exclusively By A Single First Amendment Actor Are Subject To Strict Scrutiny

Understanding *Minneapolis Star* and *Leathers* requires understanding the four cases that comprise this Court's First Amendment jurisprudence on the subject of narrowly applicable taxes. These cases subject taxes that fall on protected speakers to strict First Amendment scrutiny if they: (1) resulted from an invidious legislative motive; (2) are content-based; *or* (3) fall on a small group of speakers, creating an opportunity for the state to affect speech by leveraging its taxing power.

In *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), the Court reviewed Louisiana's 2% gross receipts tax on newspapers that contained advertising and that had a weekly circulation of over 20,000 copies. The tax on its face looked unobjectionable; but looks were deceiving. The structure of the tax caused it to fall on only 13 of the state's 137 newspapers. 297 U.S. at 240-241. Not coincidentally, these papers had been critical of Louisiana Senator Huey Long, who had apparently engineered the tax to punish his critics.[4] The Court invalidated the tax, holding that it was a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250. The Court's subsequent decisions interpret *Grosjean* as standing for the proposition that strict scrutiny applies to content-neutral taxes that burden speech

---

[4] The Court in *Grosjean* alluded to the tax's origins as political payback, but did not delve into detail. The details emerged in this Court's subsequent explanation of the result in *Grosjean*. See *Minneapolis Star*, 460 U.S. at 579-580.

based on improper legislative motives. See *Minneapolis Star*, 460 U.S. at 580.

In *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), the Court addressed a tax that affected only a small number of First Amendment actors, but where there was "no evidence of an improper censorial motive." *Id.* at 228. The case concerned an Arkansas statute that imposed a 4% gross receipts sales tax on general interest magazines, but exempted religious, professional, trade, and sports magazines. *Id.* at 224. While the tax looked broad on paper, its operational incidence was narrow. At most, only a "limited group" of three magazines paid the sales tax. *Id.* at 229 n.4. The Court invalidated the tax under strict scrutiny.

The Court identified two grounds for applying strict scrutiny: the tax constituted "discrimination" against "a small group within the press," and it was content-based. *Id.* at 229. The case now stands for the proposition that strict scrutiny applies to taxes on First Amendment actors where the tax includes content-based criteria. See *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Leathers*, 499 U.S. at 447.

*Ragland* and *Grosjean* thus address situations where a narrow tax presents an overt risk of censorship, either because of an invidious legislative motive or an explicit content-based distinction. *Minneapolis Star* fills a gap between these cases by addressing the situation where a tax is content-neutral and not invidiously motivated, yet nevertheless applies narrowly to only a few First Amendment actors.

*Minneapolis Star* involved a Minnesota statute that imposed a use tax on ink and paper consumed in the publishing process, but exempted the first $100,000 worth of ink and paper consumed in any year. *Minneapolis Star*, 460 U.S. at 577-578. The tax in theory could have applied broadly. It turned out,

however, that only 14 of 388 newspapers in the state paid the tax, and the state collected roughly 66% of tax revenues from a single newspaper publisher. *Id.* at 578-579. The tax was content-neutral, and the legislature's motive was not challenged. *Id.* at 592.

The Court held that strict scrutiny applied, and invalidated the tax. The Court observed that although the state's overall sales and use tax scheme was "generally applicable," the ink and paper tax "applies only to certain publications protected by the First Amendment." 460 U.S at 581. Indeed, "only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax." *Id.* at 591. This "differential treatment" placed "a heavier burden of justification on the State" because of the "special problems" that ensue when a tax falls primarily on a small group of actors engaged in protected speech. *Id.* at 583.

The Court identified these "special problems" as arising from the leverage over speech that the state acquired from the narrow tax. As the Court explained:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic

> assumption of our political system that the press will often serve as an important restraint on government.

460 U.S. at 585 (citations omitted).

Thus, a speaker subject to a narrowly targeted tax is "threaten[ed] * * * not only with the current differential treatment, but also with the possibility of subsequent differentially more burdensome treatment." 460 U.S. at 588. The government could thereby achieve "censorial effects" through the threat of higher taxes, without actually raising the tax. *Ibid.* Because courts were "poorly equipped" to intervene only when a tax became too high, *id.* at 589, the Court concluded that judicial intervention was necessary when the "potential for abuse" arose. *Id.* at 592. The Court therefore invalidated the Minnesota tax because allowing the state to "tailor the tax" so that it "targets" or "singles out" a "small group" "presents such a potential for abuse that no interest suggested by [the government] can justify the scheme." *Id.* at 591-592.

The Court's analysis had two distinct elements: the Court faulted the tax for treating First Amendment actors differently from the general public, *i.e.* for being "discriminatory," 460 U.S. at 591, and for applying narrowly to only a few First Amendment actors, *id.* at 591-592.

After *Grosjean*, *Ragland*, and *Minneapolis Star*, there was a question about whether the results in those cases were based on some notion of "discrimination," or rather on more practical concerns about the potential for abuse inherent in taxes that look broad but actually apply narrowly to only a few First Amendment actors. The Court partially addressed this question in *Leathers*, in which it emphasized practical considerations over theoretical concepts of discrimination.

In *Leathers*, the Court reviewed an Arkansas sales tax that applied to the "sale of all tangible personal property and specified services," including cable television, but excluding newspapers and magazines. 499 U.S. at 441-442. Cable television providers contended that the tax treated different media segments differently, in violation of the supposed principle that any discriminatory taxation of the media was unconstitutional. *Id.* at 443-444. The Court rejected the claim that taxes may never discriminate between different media segments, holding instead that differential taxation is "suspect only in certain circumstances." *Id.* at 444.

To identify these circumstances, the Court reviewed and reaffirmed the core holdings in *Grosjean*, *Ragland*, and *Minneapolis Star*. In all three cases, the statutes at issue were properly subjected to strict scrutiny because they "threaten[ed] to suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447. The potential threat arose either because of an invidious motive, *id.* at 444-445 (citing *Grosjean*), an express content distinction, *id.* at 446 (citing *Ragland*), or a narrow focus on only a few speakers, creating leverage that could be used to manipulate speech, *id.* at 445-446 (citing *Minneapolis Star*).

In particular, *Leathers* reaffirmed the leverage rationale that the Court had previously adopted in *Minneapolis Star*. The Court explained that:

> the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from this political constraint.

499 U.S. at 445-446 (citing *Minneapolis Star*, 460 U.S. at 585). The harm of "narrow targeting" — in contrast to taxing a broad constituency — was particularly acute because "a tax on a

small number of speakers runs the risk of affecting only a limited range of views," and could therefore "distort the market for ideas." 499 U.S. at 446, 448.

The Arkansas tax at issue in *Leathers* was affirmed because aside from being content-neutral and well-intentioned, the tax fell on a broad base — cable television was but one of many regulated businesses, and approximately 100 cable suppliers were subject to the tax. 499 U.S. at 448-449. The tax thus created no leverage over a particular taxpayer, and therefore survived constitutional scrutiny. *Ibid.* The cable company's discrimination theory accordingly failed absent any grounding in one of the potential threats to content identified in *Grosjean*, *Ragland*, and *Minneapolis Star*. See *Leathers*, 499 U.S. at 447.

### B. In Spite Of The Court's Practical Analysis, Some Of Its Language Creates Ambiguity About The Scope Of Its Holdings

Despite the apparent consistency within the Court's practical reasoning in *Minneapolis Star* and *Leathers*, the simultaneous use of practical analysis and formal language has spawned confusion in the lower courts. The reasoning in both cases is clearly focused on substance: the Court carefully explains why a tax that is paid by only a few people "threatens" speech, and it stresses the practical political consequences of taxing a narrow constituency. *Leathers*, 499 U.S. at 445-447; *Minneapolis Star*, 460 U.S. at 583-592. The opinions thus focus on the practical leverage actually created by a tax, rather than on the formal definition of those subject to the tax. There is no principled reason why the Court's analysis would be limited to cases where a tax *by its terms* applies narrowly; the analysis applies with identical force when a tax creates the *illusion* of general applicability, but actually *operates* narrowly.

Despite its practical focus, the Court at times used the arguably more formal terminology on which the appellate court

relied. Both *Leathers* and *Minneapolis Star* used terms such as "differential," "discrimination," "target," and "singled out," to describe the formal narrowness of the taxes at issue. *Leathers*, 499 U.S. at 444-453; *Minneapolis Star*, 460 U.S. at 581-586, 588, 592-593. Thus, while *Leathers* clarified that the "discrimination" language in prior opinions was less important than concerns about narrowness, content, and motive that had animated prior holdings, it did not clarify the extent to which the concern over narrowness was one of form or substance.

### C. This Case Is The Ideal Vehicle For Resolving The Conflict Among Lower Courts — And Ambiguity Within This Court's Subsequent Decisions — About The Scope Of *Minneapolis Star* And *Leathers*

As noted above, state courts disagree about the meaning of *Minneapolis Star* in amusement tax cases: the California courts stress its practical logic while the Illinois and Ohio courts stress its formal language (yet arrive at different levels of constitutional scrutiny). See *supra* pages 10-11. Indeed, the court below justified its refusal to apply strict scrutiny by attaching dispositive significance to the fact that the amusement tax does not "single out" speech for taxation. App., *infra*, 11a. Unlike in *Minneapolis Star*, where the tax was on publishing, the tax here does not formally single out speech because — in theory — it applies to both speech and nonspeech. *Id.* at 10a-11a. Based on this distinction, the appellate court held that there were no First Amendment interests at stake, and therefore no grounds for strict scrutiny. *Id.* at 11a-12a. *Contra United Artists*, 257 Cal. Rptr. at 128 (distinguishing between "appear[ance]" and "reality" of the tax's scope).

Federal appellate courts in other contexts likewise have conflicting views about whether *Minneapolis Star* turns on practical consequences or formal statutory distinctions. Compare *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 68 (D.C. Cir.

1998) (*Minneapolis Star* invalidated tax that "had the effect" of burdening speech), with *Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175, 184 (1st Cir. 1996) (focus of *Minneapolis Star* was tax that "applied only to the press and discriminated in favor of one class of publishers over another"). The Ninth Circuit seems to have melded the formal and practical approaches by characterizing *Minneapolis Star* as creating a "discriminatory impact" rule for First Amendment cases, *Service Employees Int'l Union* v. *Fair Political Practices Comm'n*, 955 F.2d 1312, 1320 (9th Cir. 1992), while the Fourth Circuit has taken the opposite position and rejected disparate impact analysis, see *Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181, 197 (4th Cir. 1994), vacated for consideration of mootness, 516 U.S. 415 (1996).

Even this Court's subsequent characterizations of *Minneapolis Star* are not entirely consistent. The Court's decisions typically reiterate the practical focus of *Minneapolis Star*, but the Court has also highlighted *Minneapolis Star*'s more formal nomenclature. Compare *Turner Broad. Sys.*, 512 U.S. at 659 (*Minneapolis Star* applies when tax has limited "practical application"); *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 704 (1986) (*Minneapolis Star* applies when tax "ha[s] the effect" of burdening speakers despite facially applying only to "nonexpressive activity"); *Alexander* v. *United States*, 509 U.S. 544, 556 (1993) (*Minneapolis Star* applies when the "inevitable effect" of a tax on "nonexpressive activity" is to burden speakers), with *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (characterizing *Minneapolis Star* as applying when a tax "singles out expressive activity for special regulation").[5]

---

[5] The Court's First Amendment jurisprudence outside the tax context suggests a preference for functional analysis. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931) ("in passing upon constitutional questions the court has regard to substance and not to

This case is an ideal vehicle for resolving the overlapping focus on form and substance in this Court's precedents that state and federal courts have found ambiguous. If substance controls over form, then this is an easy case for reversal: AMC pays 99% of the amusement tax. Compare *Minneapolis Star*, 460 U.S. at 578-579 (single publisher paid roughly 66% of the use tax, triggering strict scrutiny). If form is more important than substance, then this is an easy case for affirmance: the amusement tax is seemingly "broad" — it is not "discriminatory" and does not by its terms "single out" the media — if one closes one's eyes to the fact that most of what it covers does not exist.

Indeed, the challenged tax is an "amusement tax" in name only; in reality, it is an "AMC tax," just as its backers called it. See *supra* page 4. The tax is an economic lever that

---

mere matters of form, and * * * in accordance with familiar principles, the statute must be tested by its operation and effect"); *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 679 (1996) ("Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned, * * * is an enterprise that we have consistently eschewed"); *NAACP* v. *Alabama*, 357 U.S. 449, 461 (1958) ("consequence" of state action can render it unconstitutional even if effect on First Amendment rights is indirect); *Schneider* v. *New Jersey*, 308 U.S. 147, 161 (1939) ("In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation"); *cf. American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965) (in Commerce Clause context, "[w]hen passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax") (citations omitted).

Warrenville can manipulate as a carrot or stick to affect the content of AMC's protected speech without fear of resistance from a broader constituency because AMC is essentially the *only* constituency affected by the tax. See *Leathers*, 499 U.S. at 445-446 (tax that "applies only to a single constituency" is "insulated" from "political constraint"). Even a modest adjustment to the tax rate could mean tens of thousands of dollars to AMC, but merely pennies to the handful of other taxpayers.

The Court must therefore decide whether it meant what the reasoning in *Minneapolis Star* and *Leathers* says, or whether its holdings are narrower than the reasoning suggests. Either way, the Court should use this case as an opportunity to resolve the substantial confusion among lower courts, and ambiguity within the Court's own precedents, about whether functionally insignificant "breadth" can camouflage a tax's lopsided effect.

## III. IF STRICT SCRUTINY DOES NOT APPLY, THERE IS AN OPEN AND IMPORTANT QUESTION ABOUT WHETHER THE ALTERNATIVE SHOULD BE INTERMEDIATE SCRUTINY OR RATIONAL BASIS SCRUTINY

Even if AMC's First Amendment claim does not merit strict scrutiny, a question remains as to whether it merits intermediate scrutiny instead of relatively permissive rational basis scrutiny, which is normally reserved for claims that are not even colorable under the First Amendment. This question has divided state courts and stems from a gap in the Court's First Amendment decisions that warrants review.

There is ambiguity between two strands of the Court's jurisprudence about selecting standards of review in First Amendment speech cases. In one long line of cases, the Court has repeatedly held that colorable First Amendment claims are almost always subject to heightened scrutiny, and that rational

basis scrutiny is too lenient for such claims.[6] See *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force"); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994) (stating that "content-neutral, generally applicable statute[s]" are subject to intermediate scrutiny) (citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989));[7] *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 519 (1981) (plurality opinion) ("it has been this Court's consistent position that democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area"); *cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"); *Buckley* v. *Valeo*, 424 U.S. 1, 293 (1976) (Rehnquist, J., concurring in part and dissenting in part) ("because of the First Amendment overtones of the appellants' Fifth Amendment equal protection claim, something more than a merely rational basis for the difference in treatment must be shown, as the Court apparently recognizes"). Thus, intermediate scrutiny applies in numerous

---

[6] The exception is challenges to prison regulations, which are subject to something akin to rational basis review. See *Turner* v. *Safley*, 482 U.S. 78, 89 (1987) (limitation on speech in prison must be "reasonably related to legitimate penological interests").

[7] The dissent in *Madsen* agreed with this aspect of the Court's analysis. See *Madsen*, 512 U.S. at 790-791 (Scalia, J., concurring in part and dissenting in part) (identifying "two well-established standards" for speech cases: "strict scrutiny" and "intermediate scrutiny," and suggesting that "rational basis" scrutiny is limited to "nonspeech" cases under the Equal Protection Clause).

circumstances where strict scrutiny is too strong and rational basis review is too weak.[8]

This Court's repeated rejection of rational basis review in speech cases would seem to mandate intermediate scrutiny when strict scrutiny does not apply. Yet a separate line of cases holds that generally applicable taxes and regulations that affect speakers do not even implicate the First Amendment, and thus warrant no more than rational basis scrutiny. See, *e.g.*, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669-670 (1991) (citing cases). The court below concluded that because the amusement tax is a "general business tax[]," it required only rational basis review. App., *infra*, 13a.

This case offers the perfect opportunity to decide how cases refusing to apply rational basis scrutiny to speech claims fit with cases applying rational basis scrutiny to generally applicable legislation — particularly in the context of ostensibly broad, but in reality narrow, taxes on First Amendment actors. The Court's explication of when intermediate and rational basis scrutiny apply would provide valuable guidance to the lower courts, and fill an important gap in First Amendment jurisprudence.[9]

---

[8] See, *e.g.*, *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623-624 (1995) (commercial speech); *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968) (incidental burdens on expression); *Ward*, 491 U.S. at 791 (time, place, and manner restrictions).

[9] The appellate court did not decide whether Warrenville's tax could survive intermediate scrutiny. If the Court grants certiorari and rules that intermediate scrutiny is the appropriate standard, it could either apply that test to the undisputed facts or remand to the state court. The question of which standard of review should apply is likely to be dispositive on the merits because the amusement tax is not even remotely tailored to an important state interest or structured to minimize burdens on speech. See, *e.g.*, *Turner Broad. Sys.*, 512

## IV. THE APPELLATE COURT'S HOLDING CREATES IMMENSE POTENTIAL FOR MISCHIEF

Beyond providing an opportunity to resolve a split in authority and clarify ambiguous doctrine, the petition presents compelling grounds to address a decision that poses a serious threat to speech. The rationale adopted by the appellate court invites legislative mischief, and if followed by other courts would undermine First Amendment rights, both in the amusement tax context and beyond. First Amendment doctrine neither is nor should be what the appellate court held, but it will devolve that way — especially in the state tax context, where there is no original federal jurisdiction — unless this Court provides needed guidance.

### A. The Appellate Court's Reliance On "General Applicability" Exalts Form Over Substance And Sets A Dangerous Precedent For First Amendment Freedoms

The appellate court's primary ground for distinguishing *Minneapolis Star* rests on a stilted concept of "general

---

U.S. at 662 (regulation survives intermediate scrutiny only if it "furthers an important or substantial governmental interest" *and* the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). There is no evidence that either the scope or amount of the amusement tax reflects any assessment of need, no evidence that the city considered alternatives to the tax, and no evidence that the city made any effort to minimize the potential threat to speech. See *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 416, 424-425 (1993) (restriction on speech must be tailored to the interest justifying such restriction); *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 213 (1997) (intermediate scrutiny requires "fit" between ends and means); *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993) (same).

applicability": the tax evades scrutiny because it in theory applies to activities that in reality do not exist. Such unprincipled reliance on form over substance is an invitation for legislative abuse.

Consider the following hypothetical: suppose that Warrenville had adopted an explicit "AMC tax" that applied only to AMC. That tax would obviously be unconstitutional even under the appellate court's reasoning. Now consider what Warrenville actually did: it adopted the AMC tax, but added some language about circuses, rodeos, and animal acts, knowing that there were no such activities in town. The only difference between the obviously unconstitutional "AMC tax" and the "amusement tax" that the appellate court upheld is some token breadth that adds an extra 0.42% of revenue. Under no reasonable interpretation of the First Amendment can the 0.42% of "broad" padding cause the remaining 99.58% of narrow tax to plummet from strict scrutiny all the way down to rational basis scrutiny. The First Amendment cannot be so myopic that it overlooks the "AMC tax" simply because it is dressed in "amusement tax" clothing.

The petition thus raises broad questions about the extent to which local governments can evade constitutional scrutiny through clever legislative artifices. In a triumph of double-speak, a tax that was directed — by name — at a single theater and that falls almost entirely — more than 99% — on that theater has been judicially sanctified as "generally applicable." Such disturbing displacement of a fundamental civil liberty warrants this Court's attention.

### B. The Court Should Address Taxes On First Amendment Activities Before Governments And Courts Rely On The Decision Below

The imposition of amusement taxes on movie theaters has already generated substantial litigation across the country, and

is likely to recur even more frequently in light of the trend created by the Ohio and Illinois decisions upholding such taxes. Indeed, the aftershocks of the appellate court's ruling are already being felt. In its wake, at least one town — Edwardsville in southern Illinois — has been emboldened to adopt its own "amusement tax" that primarily affects one local movie theater. See Edwardsville Ordinance No. 5321-6-D1 (eff. Aug. 1, 2001) (taxing movie theaters and "amusements" such as "circuses" and "pony rides"). Other municipalities are likely to follow, as the appellate court's decision opens new local financing options at the expense of the First Amendment. Before this case, many cities had been persuaded not to enact narrowly applicable amusement taxes by the prospect of judicial review — but that deterrent is now hollow. See, *e.g.*, Pat Clawson, *Village Repeals Tax on Movie Theater to Avoid a Lawsuit*, Chi. Trib., Nov. 8, 1996, at 2 (noting that town of Streamwood Illinois repealed amusement tax after similar taxes were struck down at the trial court level); R. A. Hutchinson, *City Could Raise Tax on Hotel*, L.A. Daily News, Sept. 17, 1994, at TO1 (reporting that First Amendment concerns apparently dissuaded city of Agoura Hills from taxing movie theater).

The constitutional threat also extends beyond amusement taxes, and is limited only by the creativity of taxing authorities. It is inevitable that as governments search for new ways to raise revenue, they will not overlook the new opportunities made available to them by state courts that have declined to enforce *Minneapolis Star*. A ruling clarifying the applicable First Amendment constraints in this area would therefore ease uncertainty and stave off wasteful regulation or litigation.

### C. Review Is Necessary Given The Fragility Of The Speech At Issue, The Potential For Censorship, And The Likelihood That Tax Burdens On Speech Will Otherwise Evade Judicial Scrutiny

This Court has recognized that speech by cost-sensitive First Amendment actors such as theaters is especially vulnerable to economic leverage, and therefore needs careful judicial protection.[10] For example, while invalidating a licensing requirement for movie exhibitions, the Court observed that "in the case of motion pictures, it may take very little to deter exhibition in a given locality," as the "exhibitor's stake in any one picture may be insufficient" to justify fighting censorship. *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965). Likewise, in invalidating a rule that barred federal employees from receiving honoraria for speeches, the Court noted that even a facially neutral statute can create a "significant burden on expressive activity" by manipulating the financial consequences of speech and thereby deterring it. *National Treasury*, 513 U.S. at 468-469. The potential chilling effect of third-party leverage over speech exists in other contexts as well. See, *e.g.*, *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 257 (1974) (expressing concern that right-of-access requirement would chill newspapers' speech because "editors might well conclude that the safe course is to avoid controversy").

The tax at issue in this and similar cases can thus distort speech in ways that undermine First Amendment values, but

---

[10] This point is especially important in the present economic climate, which in recent years has seen several nationwide theater chains file for bankruptcy. See, *e.g.*, Nicole Sperling, *Regal Lays Out Its Bankruptcy, Recovery Plans*, Hollywood Rptr., Sept. 7, 2001 (noting that a "dozen" major theater chains " have crashed financially since last year").

that do not generate litigation and therefore escape judicial review. Subjecting a tax to rigorous scrutiny before it is abused is the best way to prevent such abuse. See *Minneapolis Star*, 460 U.S. at 589 (noting that courts are "poorly equipped" to police manipulation of taxes).

The prospect of informal censorship is all too real; local governments in Illinois and elsewhere have an unfortunate tendency to exert political pressure on theaters' editorial choices about which motion pictures to exhibit.[11] The Court should therefore give careful attention to any judicial doctrine that adds narrowly targeted taxes to the potential anti-speech arsenal of local governments.

* * * * *

The petition affords the Court an opportunity to address important and recurring questions, on which state courts have split, and where the threat to First Amendment values is likely to escalate absent prompt intervention. This case is the best vehicle for the questions presented that the Court is likely to encounter, and warrants this Court's review.

---

[11] See, *e.g.*, Alf Siewers, *Suburb Board Votes to Bar Jesus Film – Sight Unseen*, Chi. Sun-Times, July 21, 1988, at 26 (reporting vote of Chicago Ridge village board to request that local theaters not exhibit *The Last Temptation of Christ*); Charlie Lanter, *Character First Panel Targets Movies*, Peoria J. Star, Aug. 6, 1999, at A1 (reporting efforts of Peoria's mayor to influence movie selection at local theaters); James Strong, *Aldermen Take Time Out to Put On a Morality Play*, Chi. Trib., Mar. 26, 1986, at 2 (reporting Chicago aldermen's efforts to ban exhibition of the film *Hail Mary*). See generally Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus The Desire to Sanitize Society*, 33 WM. & MARY L. REV. 741, 761 (1992) ("The first motion pictures appeared in the late nineteenth century, and soon thereafter came the first incidents of censorship").

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES ROTHFELD
*Mayer, Brown & Platt*
*1909 K Street, N.W.*
*Washington, D.C. 20006*
*(202) 263-3000*

JAMES C. SCHROEDER
*Counsel of Record*
DANIEL J. DELANEY
ALLAN H. ERBSEN
*Mayer, Brown & Platt*
*190 South LaSalle Street*
*Chicago, Illinois 60603*
*(312) 782-0600*

SEPTEMBER 2001

# APPENDIX

**APPENDIX A**

**IN THE**
**APPELLATE COURT OF ILLINOIS**
**SECOND DISTRICT**

---

**No. 2-00-0701**

American Multi-Cinema, Inc.,
*Plaintiff-Appellant,*

*v.*

The City of Warrenville,
*Defendant-Appellee.*

---

Appeal from the Circuit Court
of Du Page County
No. 99-MR-24
Honorable Bonnie M. Wheaton,
Judge, Presiding

---

[Filed April 27, 2001]

Justice RAPP delivered the opinion of the court:

Plaintiff, American Multi-Cinema, Inc. (AMC), brought an action in the circuit court of Du Page County challenging the constitutionality of an ordinance enacted by defendant, City of Warrenville (City), imposing an amusement tax. AMC appeals from the order of the circuit court granting the City's motion for summary judgment and denying AMC's cross-motion for summary judgment. We affirm.

## I. FACTS

In March 1997, the City adopted Ordinance No. 1566 (ordinance) entitled "Ordinance Creating an Amusement Tax and Amending the City Code in Accordance Therewith (City of Warrenville, Ordinance No. 1566 (eff. January 1, 1998))." The ordinance was enacted pursuant to section 11-42-5 of the Illinois Municipal Code (65 ILCS 5/11-42-5 (West 1996)) and imposes a 2% tax on the gross receipts for admission fees for "amusements," which the ordinance defines as:

> Any and all spectator and exhibitive entertainment, including but not necessarily limited to the following activities: any movie; theatrical, dramatic, musical or spectator performance; carnival; circus; rodeo; animal act; amusement ride; amusement attraction; game; or animal show.

City of Warrenville, Ordinance No. 1566 (eff. January 1, 1998).

The ordinance took effect in January 1998. Until that time the City did not tax amusements and had no movie theaters. The mayor and members of the city council have, on occasion, referred to the ordinance as the "AMC amusement tax."

In 1996 and early in 1997, prior to adoption of the ordinance, AMC had purchased land and finalized plans to construct a 30-screen theater in the City. AMC's theater, called the AMC Cantera 30, opened in March 1998 and has been in continuous operation since that time. AMC has chosen to pay the tax from gross revenues rather than increasing ticket prices. AMC has paid more than 99% of the taxes collected by the City pursuant to the ordinance.

AMC originally presented this case to the trial court in a two-count complaint brought under section 1983 of the Civil Rights Act (42 U.S.C. §1983 (1994)) seeking declaratory and injunctive relief. The trial court dismissed the complaint

because it found that an adequate remedy existed under state law.

AMC filed an amended complaint on April 30, 1999. Counts I and II sought declaratory and injunctive relief under state law. Specifically, AMC alleged that the amusement tax violates the first and fourteenth amendments to the United States Constitution (U.S. Const., amends. I, XIV) because it impermissibly targets expressive conduct for special tax treatment but excludes other activities from such taxes. AMC prayed for a declaration that the amusement tax is unconstitutional, for an order enjoining further collection of the amusement tax, and for a refund of previously paid amusement taxes. In counts III and IV, AMC sought the same relief pursuant to sections 1983 and 1988 of the Civil Rights Act (42 U.S.C. §§1983, 1988 (1994)) to the extent that such relief was unavailable under state law.

The parties each sought summary judgment, agreeing that there were no genuine issues of material fact as to the allegations in AMC's complaint. The City argued that the ordinance was enacted pursuant to state law, is content neutral, and has been uniformly applied. With its motion for summary judgment, the City filed the affidavit of Jean McCabe, finance director for the City. According to the affidavit, AMC had paid $188,642.70 since the ordinance was enacted. The City also received payment of amusement tax from four additional entities, including Acorn Coffee Bar of the Folk Lore Center ($211.48); Avalanche II Sports Bar and Grill ($323.56); The Corner Cue ($64.44); and Satisfied Frog Sports Bar and Grill ($99.05).

In its cross-motion for summary judgment, AMC argued that it was entitled to summary judgment because the ordinance targets expressive conduct for special tax treatment, the ordinance applies exclusively to AMC, and the City has no compelling governmental interest to justify the tax. AMC

pointed to admissions made by the City that Acorn Coffee Bar paid an additional $14.06 and Satisfied Frog an additional $47.30 in April 1999, bringing the amusement tax totals for these two entities to $225.54 and $146.35, respectively.

The parties filed briefs in support of their motions for summary judgment, and the trial court heard oral argument. In granting the City's motion and denying AMC's motion, the trial court stated:

> There is nothing that appears to this Court to require the highest level of scrutiny of the First Amendment tests. The ordinance that has been passed * * * is a content-neutral tax. There is no exemption for any type of expression which would promote or suppress any particular type of expression. It is fairly broad in its definition of amusement, and I think that [counsel for the City] is correct that it's simply the forces of the marketplace that make it fall more heavily on one entity than on any other.
>
> However, as [the City's counsel] has said, there are other business entities which are proportionally taxed and affected. But it is the force of the marketplace that makes it fall * * * in a more burdensome fashion on AMC. But that fact alone does not render this a violation of the First Amendment.
>
> I believe that *Leathers* is controlling. And in this particular situation, since there is nothing that appears to regulate the content of any of the motion pictures that are exhibited or would even threaten to regulate the content in any realistic and meaningful fashion, that the specific legislation * * * is not violative of any Constitutional protection, specifically does not violate the First amendment."

AMC filed a timely notice of appeal.

## II. DISCUSSION

We begin by noting that, although AMC's notice of appeal references the order dismissing counts I and II of the complaint, which were realleged in the amended complaint as counts III and IV, AMC makes no argument concerning these counts on appeal. Accordingly, these counts have been abandoned and any arguments thereunder are waived. *See Old Kent Bank-St. Charles N.A. v. Surwood Corp.*, 256 Ill. App. 3d 221, 230 (1994).

On appeal, AMC argues that the trial court should have applied strict scrutiny in evaluating the constitutionality of the ordinance and that under strict scrutiny the ordinance violates the first amendment. Alternatively, AMC argues that the trial court erred in its application of intermediate scrutiny. AMC prays for the reversal of the trial court's order granting summary judgment in favor of the City and for judgment in AMC's favor. The City urges us to affirm the trial court, arguing that the trial court applied the appropriate level of scrutiny and that the trial court's holding that the ordinance does not violate the first amendment was proper.

Accordingly, we must decide whether the trial court applied the appropriate level of judicial scrutiny and, if so, whether the ordinance satisfies that scrutiny. We conduct a *de novo* review of an order granting summary judgment. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 30, (1999). In ruling on the motion, the court is required to construe all evidentiary material strictly against the movant and liberally in favor of the respondent. *Laurel Motors, Inc. v. Airways Transportation Group of Cos.*, 284 Ill. App. 3d 312, 316 (1996). A trial court's ruling with respect to the constitutionality of a statute is reviewed *de novo*. *Russell v. Department of Natural Resources*, 183 Ill. 2d 434, 441 (1998). We may affirm the trial court's ruling on any basis supported by the record. *Messenger v. Edgar*, 157 Ill. 2d 162, 177 (1993).

## A. THE APPROPRIATE LEVEL OF FIRST AMENDMENT SCRUTINY

The City enacted the amusement tax pursuant to section 11-42-5 of the Illinois Municipal Code (65 ILCS 5/11-42-5 (West 1996)), which grants municipalities the specific power to license, tax, and regulate amusements and places of amusement. *See Chicago Health Clubs, Inc. v. Picur*, 124 Ill. 2d 1, 12 (1988). AMC contends that the City did not exercise its authority under this enabling statute in a constitutional manner because the amusement tax violates AMC's first amendment rights.

The first amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." U.S. Const., amend. I. The first amendment is incorporated into the due process clause of the fourteenth amendment and thereby made applicable to the states. *Stromberg v. California*, 283 U.S. 359, 368, 75 L. Ed. 1117, 1122-23, 51 S. Ct. 532, 535 (1931) . "[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502, 96 L. Ed. 1098, 1106 72 S. Ct.. 777, 781 (1952). Although it is constitutional to tax first amendment activities in a genuinely nondiscriminatory fashion (*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229, 95 L. Ed. 2d 209, 219, 107 S. Ct. 1722, 1727 (1987)), the Supreme Court in *Leathers v. Medlock*, 499 U.S. 439, 113 L. Ed. 2d 494, 111 S. Ct. 1438 (1991), identified three situations where a tax imposed by government will trigger strict scrutiny under the first amendment. First, "[a]bsent a compelling justification, the government may not exercise its taxing power to single out the press." *Leathers*, 499 U.S. at 447, 113 L. Ed. 2d at 503, 111 S. Ct. at 1443. Second, "[a] tax is also suspect if it targets a small group of speakers." *Leathers*, 499 U.S. at 447, 113 L. Ed. 2d at 503-04, 111 S. Ct. at 1443. Finally, "a tax will

trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech." *Leathers*, 499 U.S. at 447, 113 L. Ed. 2d at 504, 111 S. Ct. at 1444.

It is undisputed that the ordinance involved in this case is content neutral as written. AMC does not contend that the amusement tax is the product of censorial motive or that it is facially content based. There is nothing in the language of the ordinance that refers to the content of the films shown. Accordingly, we are concerned only with whether the ordinance imposes a differential tax or, put another way, whether the amusement tax discriminates against first amendment speakers.

AMC relies primarily on *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983), in support of its argument that the trial court should have applied strict scrutiny in assessing the ordinance.

At issue in *Minneapolis Star* was a Minnesota special use tax on the cost of paper and ink products consumed in the production of publications. *Minneapolis Star*, 460 U.S. at 577, 75 L. Ed. 2d at 300, 103 S. Ct. at 1368. The Minnesota legislature exempted from the tax the first $100,000 worth of ink and paper consumed by a publication in a year. *Minneapolis Star*, 460 U.S. at 578, 75 L. Ed. 2d at 300, 103 S. Ct. at 1368. As a result, 11 publishers, producing 14 of 368 newspapers, incurred a tax liability. *Minneapolis Star*, 460 U.S. at 578, 75 L. Ed. 2d at 300, 103 S. Ct. at 1368. The Star Tribune paid roughly two-thirds of the total revenue raised by the tax. *Minneapolis Star*, 460 U.S. at 578, 75 L. Ed. 2d at 300, 103 S. Ct. at 1368. The Star Tribune challenged the imposition of the use tax as a violation of the guarantees of freedom of the press and equal protection in the first and fourteenth

amendments. *Minneapolis Star*, 460 U.S. at 579, 75 L. Ed. 2d at 300, 103 S. Ct. at 1368.

The *Minneapolis Star* court noted that government can subject newspapers to generally applicable economic regulations without violating the constitution, but concluded that Minnesota created a special tax that "is facially discriminatory" in that it singles out publications protected by the first amendment. *Minneapolis Star*, 460 U.S. at 581, 75 L. Ed. at 302, 103 S. Ct. at 1369-70. The Supreme Court explained that Minnesota "has singled out the press for special treatment." *Minneapolis Star*, 460 U.S. at 582, 75 L. Ed. 2d at 303, 103 S. Ct. at 1370.

In explaining the problematic nature of differential taxation, the Supreme Court stated:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. [Citation.] When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

*Minneapolis Star*, 460 U.S. at 585, 75 L. Ed. 2d at 304-05, 103 S. Ct. at 1371-72.

The Supreme Court then concluded that strict scrutiny applies:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

*Minneapolis Star*, 460 U.S. at 585, 75 L. Ed. 2d at 305, 103 S. Ct. at 1372.

The Supreme Court then found that Minnesota's interest in raising revenue standing alone could not justify the special treatment of the press because an alternative means of achieving the same goal without raising first amendment concerns was available. *Minneapolis Star*, 460 U.S. at 586, 75 L. Ed. 2d at 305, 103 S. Ct. at 1372.

The second reason the *Minneapolis Star* court held that strict scrutiny applied and that the use tax violated the first amendment was that the tax targeted a small group of newspapers. The court explained:

> Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

*Minneapolis Star*, 460 U.S. at 591-92, 75 L. Ed. 2d at 309, 103 S. Ct. at 1375.

*Minneapolis Star* teaches that strict judicial scrutiny applies to differential tax legislation that (1) singles out first amendment actors as a whole; or (2) singles out a subgroup of first amendment actors.

In this case, the ordinance does not single out first amendment activities; rather, it has a broad application. The ordinance taxes amusements, which it defines as:

> Any and all spectator and exhibitive entertainment, including but not necessarily limited to the following activities: any movie; theatrical, dramatic, musical or spectator performance; carnival; circus; rodeo; animal act; amusement ride; amusement attraction; game; or animal show.

City of Warrenville, Ordinance No. 1566 (eff. January 1, 1998).

Although many of these types of amusements include expression protected by the first amendment (*see Winters v. New York*, 333 U.S. 507, 510, 92 L. Ed. 840, 847, 68 S. Ct. 665, 668-69 (1948) (protected speech is not limited solely to the expression and communication of ideas, but may include forms of expression that also entertain)), others do not. We do not find, nor does AMC argue, that the amusement tax facially discriminates against only first amendment actors. AMC is subject to the amusement tax because AMC is a business engaged in amusements, not because AMC is a first amendment actor. The ordinance is not a differential tax but, rather, a tax that applies generally to all amusements as defined by the ordinance.

AMC contends that the ordinance is subject to strict scrutiny under *Minneapolis Star* because the amusement tax singles out AMC and creates impermissible governmental leverage over AMC's constitutionally protected speech. We disagree.

AMC contends that the record clearly shows that the amusement tax was motivated by the City's desire to tax AMC. In support of this contention, AMC points out that no amusement tax existed in the City until AMC started building its theater; the effective date of the ordinance roughly coincided with the opening of AMC's theater; City officials have publicly referred to the ordinance as the "AMC Entertainment Tax" and the "AMC amusement tax"; the City did not enforce the tax against other entities engaged in amusement until AMC threatened legal action; and even when

five other entities began to pay the tax, AMC still bore over 99% of the burden.

AMC confuses the permissible targeting of a revenue source with the impermissible targeting of a first amendment speaker. Even if AMC was targeted by the City as a revenue source, as the timing of the ordinance and comments by City officials indicate, the ordinance itself is not tailored to single out AMC or movie theaters as a group of first amendment actors. As noted above, the ordinance applies to all amusements within the City. The ordinance also applies to all movie theaters; AMC's Cantera 30 just happens to be the only theater in the City.

We agree with the trial court's conclusion that it is the happenstance of the marketplace in the City that causes the brunt of the tax to land upon AMC, not the structure of the ordinance. While the legislation at issue in *Minneapolis Star* was tailored to single out a few members of the press, namely, publications that consume more than $100,000 worth of paper and ink, the City's ordinance is not tailored to differentiate between large and small theaters or to single out any first amendment actor. The ordinance would operate in the same fashion if the City contained 30 one-screen theaters rather than AMC's one 30-screen theater.

Further, AMC has paid more than 99% of the amusement tax because of the market conditions in the City, not because of the structure of the ordinance imposing the amusement tax. The other entities engaged in amusement in the City are taxed the same percentage of gross receipts but apparently do much less business. AMC bears more than 99% of the amusement tax burden simply because AMC has enjoyed more than 99% of the amusement business within the City. *Minneapolis Star* prohibits government from tailoring legislation that singles out a first amendment speaker for differential tax treatment. *Minneapolis Star*, 460 U.S. at 591-92, 75 L. Ed. 2d at 309, 103 S. Ct. at 1375. However, *Minneapolis Star* does not prohibit

the enactment of a content-neutral and facially nondiscriminatory tax that primarily impacts one first amendment actor due to market conditions rather than the structure of the legislation.

The City's failure to enforce the tax against other entities engaged in amusement until AMC threatened legal action does not change our conclusion. Under an equal protection analysis, our supreme court has held that the lax enforcement of a municipal amusement tax did not render the enacting ordinance invalid because there was no showing of intentional or purposeful discrimination. *Kerasotes Rialto Theater Corp. v. City of Peoria*, 77 Ill. 2d 491, 499-500 (1979). The lax enforcement of the ordinance against the other entities engaged in amusement and the fact that the City did not impose an amusement tax on these entities before AMC built its theater show that the City targeted AMC as a revenue source. It does not show intentional discrimination of first amendment activities and does not render the ordinance differential.

Because we conclude that the ordinance is content neutral and does not impose a differential tax, we hold that the trial court did not err in failing to apply strict judicial scrutiny in analyzing the constitutionality of the ordinance.

## B. THE APPLICATION OF THE APPROPRIATE LEVEL OF SCRUTINY

The record shows that the trial court did not apply the highest level of judicial scrutiny in finding the ordinance constitutional; however, it is not clear what level of scrutiny the trial court did apply. The City urges us to apply an intermediate level of scrutiny. Where an ordinance is content neutral and imposes an incidental burden on speech, the appropriate level of scrutiny used to evaluate its constitutionality is intermediate. *See Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 662, 129 L. Ed. 2d 497, 530, 114 S. Ct. 2445, 2469 (1994).

AMC argues that the ordinance does not withstand even intermediate scrutiny.

Under intermediate scrutiny, a content-neutral regulation will be sustained if:

> "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

*Turner Broadcasting*, 512 U.S. at 662, 129 L. Ed. 2d at 530, 114 S. Ct. at 2469 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 680, 88 S. Ct. 1673, 1679 (1968)).

We need not consider whether the ordinance withstands an intermediate level of scrutiny because we hold that the ordinance at issue does not burden speech. Therefore, the ordinance should be evaluated under a rational basis level of scrutiny.

Unless legislation operates to disadvantage a suspect class or infringes upon a fundamental right, the legislation, to be upheld as constitutional, must simply bear a rational relationship to a legitimate governmental interest. *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 368 (1985). Freedom of speech is a fundamental right protected by the first amendment. *See Near v. Minnesota*, 283 U.S. 697, 706, 75 L. Ed. 1357, 1361-62, 51 S. Ct. 625, 628 (1931). However, no rights under the first amendment are abridged by the ordinance. As we stated above, the ordinance is content neutral, does not differentiate first amendment actors from nonfirst amendment actors, and is not tailored to discriminate against a small group or even one first amendment actor. The state may apply general business taxes without violating the first amendment, even though some of these business activities relate to free speech. *See Minneapolis Star*, 460 U.S. at 581, 75 L. Ed. 2d at

302, 103 S. Ct. at 1369; *Arkansas Writers' Project*, 481 U.S. at 229, 95 L. Ed. 2d at 219, 107 S. Ct. at 1727. Accordingly, the amusement tax does not impose a burden on free speech and must only withstand the rational basis test.

The issue we are left with is whether there is a rational basis to tax businesses engaged in amusement. The only interest asserted by the City for imposing the amusement tax is to raise revenue. Raising revenue is critical to government. *Minneapolis Star*, 460 U.S. at 586, 75 L. Ed. 2d at 305, 103 S. Ct. at 1372. Statutes bear a strong presumption of constitutionality, and the burden of proving invalidity is on the party challenging the enactment. *Chicago Tribune Co. v. Johnson*, 106 Ill. 2d 63, 71 (1985). Broad latitude is afforded to legislative classifications for taxing purposes. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 250 (1996).

According to the record, the AMC Cantera 30 theater had 1,785,347 paid admissions between March 1998 and April 1999. Even when the record is construed strictly against the City and liberally in favor of AMC (*see Laurel Motors*, 284 Ill. App. 3d at 316), we cannot conclude that there is no rational relationship between the increased burden on local government as a result of commercial entertainment and the need to raise revenue to meet that burden. We hold that there is a rational basis for the City's amusement tax and therefore the ordinance is constitutional.

## III. CONCLUSION

For the foregoing reasons the judgment of circuit court of Du Page County is affirmed.

Affirmed.

GROMETER and CALLUM, JJ., concur.

**APPENDIX B**

**SUPREME COURT OF ILLINOIS**
**CLERK OF THE COURT**
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701

---

**No. 91649**

American Multi-Cinema, Inc.,
*Petitioner,*

*v.*

The City of Warrenville,
*Respondent.*

---

Leave to Appeal, Appellate Court, Second District

---

June 29, 2001

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on July 23, 2001.

## APPENDIX C

**IN THE CIRCUIT COURT**
**OF THE 18TH JUDICIAL CIRCUIT**
**DU PAGE COUNTY, ILLINOIS**

---

**No. 99-MR-24**

American Multi-Cinema,
*Plaintiff,*

*v.*

City of Warrenville,
*Defendant.*

---

ORDER

---

[Filed May 19, 2000]

This matter coming on to be heard on cross motions for summary judgment, the Court being fully advised in the premises and having jurisdiction of the subject matter, IT IS ORDERED HEREBY:

(1) That Plaintiff's Motion for Summary Judgment is Denied for the Reasons set forth on the Record.

(2) That Defendant's Motion for Summary Judgment is granted for the Reasons set forth on the Record.

(3) That This Order is a Final and Appealable Order Pursuant to Supreme Court Rule.

ENTER: /s/
Judge

DATE: May 19, 2000

## APPENDIX D

**IN THE CIRCUIT COURT**
**OF THE 18TH JUDICIAL CIRCUIT**
**DU PAGE COUNTY, ILLINOIS**

---

**No. 99 MR 0024**

American Multi-Cinema, Inc.,
*Plaintiff,*

*v.*

City Of Warrenville,
a Municipal Corporation,
*Defendant.*

---

**REPORT OF PROCEEDINGS**
**May 19, 2000**

Proceedings had and testimony taken at the hearing of the above-entitled cause, taken before the Honorable Bonnie M. Wheaton, Judge of said Court, at 505 North County Farm Road, Room 2007, Wheaton, Illinois.

* * * * *

[38] * * * THE COURT: Thank you. One of the important distinctions between the situation that faces the Court today and the other cases, Leathers, Grossjean and Turner, is that the power of taxation of amusements is a [39] power that is specifically granted to municipalities by the Illinois Legislature. This power of taxation has a history of over 100 years in Illinois and has never on its — in its history been found unconstitutional.

The statute itself makes no distinction between large municipalities and small towns. Obviously the effect is going to be different in municipalities that have over a million people than those that have a few thousand people. But the legislature in its wisdom has not seen fit to distinguish between this power of taxation in large municipalities and small municipalities. I think that that distinction is one that is very important because since it is within the rights granted by the legislature to the municipality.

There is nothing that appears to this Court to require the highest level of scrutiny of the First Amendment tests. The ordinance that has been passed, specifically Ordinance No. 1566, on its face is a content-neutral tax. There is no exemption for any type of expression which would promote or suppress any particular type of expression. It is fairly broad in its definition of amusement, and I think that Mr. Pieper is [40] correct that it's simply the forces of the marketplace that make it fall more heavily on one entity than on any other.

However, as Mr. Pieper has said, there are other business entities which are proportionally taxed and affected. But it is the force of the marketplace that makes it fall more effectively — in a more burdensome fashion on AMC. But that fact alone does not render this a violation of the First Amendment.

I believe that Leathers is controlling. And in this particular situation, since there is nothing that appears to regulate the content of any of the motion pictures that are exhibited or would even threaten to regulate the content in any realistic and meaningful fashion, that the specific legislation, Ordinance No. 1566 is not violative of any Constitutional protection, specifically does not violate the First Amendment.

And I think therefore it is incumbent on the Court to grant the motion for summary judgment of the City of Warrenville and deny the motion for summary judgment of AMC. And that will be a final and appealable [41] order.

## APPENDIX E

**CITY OF WARRENVILLE**
**Du Page County, Illinois**

**ORDINANCE NO. 1566**

**ORDINANCE CREATING AN AMUSEMENT TAX AND AMENDING THE CITY CODE IN ACCORDANCE THEREWITH**

WHEREAS, pursuant to 65 ILCS 5/11-42-5, the City of Warrenville may license, tax or regulate theatricals, other exhibitions, shows and amusements; and

WHEREAS, the Mayor and City Council find and hereby declare that it is in the best interests of the City to establish an amusement tax pursuant to said statutory authority;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF WARRENVILLE, DU PAGE COUNTY, ILLINOIS, AS FOLLOWS:

SECTION ONE: The recitals set forth hereinabove shall be and they are hereby incorporated as if said recitals were fully set forth within this Section One.

SECTION TWO: Title 3 of the City Code of the City of Warrenville shall be and is hereby amended to add a new Chapter 12 thereto, which new Chapter 12 shall hereafter be and read as follows:

CHAPTER 12

AMUSEMENT TAX

3-12-1: DEFINITIONS: For purposes of this Chapter the following definitions shall apply:

| | |
|---|---|
| ADMISSION FEES OR OTHER CHARGES | Fees, charges, or other consideration paid for entrance to an amusement or the right to view an amusement. |
| AMUSEMENT | Any and all spectator and exhibitive entertainment, including but not necessarily limited to the following activities: any movie; theatrical, dramatic, musical or spectator performance; carnival; circus; rodeo; animal act; amusement ride; amusement attraction; game; or animal show. |
| AMUSEMENT ATTRACTION | Any show, exhibition or nonamusement ride entertainment device; or an enclosed building or structure, including electrical equipment which is an integral part of the building or structure, through which people walk without the aid of any moving device, that provides amusement, thrills, entertainment or excitement. |
| AMUSEMENT RIDE | Any mechanized device or combination of devices, including any electrical equipment which is an integral part of the device or devices, which carries passengers along, around, or over a fixed or restricted course for the primary purpose of giving its passengers amusement, pleasure, thrills or excitement. |

3-12-2: AMUSEMENT TAX.

A. Imposed; amount.

1. A tax is hereby imposed upon all persons operating amusements, and upon persons operating places of amusement within the corporate limits of the City in an amount equal to two percent (2%) of the gross receipts collected in the form of fees or charges for admission to any facility and/or the use of any facility or equipment for the purpose of witnessing any amusement, irrespective of whether such fees or charges are characterized as admission fees, membership fees, service or use charges or rent. Gross receipts as defined herein shall be exclusive of any tax imposed by the United States, the State of Illinois, or any other governmental unit.

2. Any person subject to the amusement tax imposed herein may separately itemize and charge to patrons in addition to any admission fee, the amount of amusement tax attributable to such admission fee.

3. In addition to all other taxes due on account of the amusement, any tax not paid when due, there shall be added an additional amusement tax equal to an amount of 1.25 percent of the tax due for each month or fraction of a month that the payment is past due.

4. The tax herein imposed shall not apply:

a. To any coin operated amusement device as set forth in Article 9 of this Chapter 3; or

b. To any amusements whenever both of the following conditions exist:

(1) The amusement is operated by a municipality, park district, school district, or any

other unit of local government, whether individually or jointly; and

(2) The place the amusement is conducted is owned by a municipality, park district, school district, or any other unit of local government, whether individually or jointly.

B. Time of payment. The tax herein imposed shall be due and payable on the thirtieth day of the following month for the preceding calendar month, provided however that the tax herein imposed upon amusements not conducted as a continuing and permanent amusement but as a temporary or one time event shall be due on the day following the holding of said event. Said tax shall be payable to and collected by the City Treasurer or his designee.

C. Reports. At the time of tendering the final payment of the tax due, the person responsible for payment of the tax shall file with the City Treasurer or his designee a written report in such form as the City Treasurer shall from time to time provide, requiring such information regarding the business enterprise for which the amusement is conducted as the City Treasurer or his designee deems appropriate. The report shall be verified under oath by any person authorized in the State of Illinois to administer oaths. Acceptance by the City of any amount tendered in payment of the amusement tax shall be without prejudice to any claim, demand, or right on account of any deficiency in the payment of the tax.

D. Books and records. There shall at all times be maintained a complete and accurate record of all amusement receipts and books and accounts which provide a detailed and accurate record of all amusement receipts together with a description of the nature and type of amusement receipt. These books and records shall be kept at the place of amusement or such other place in the City, or if the person

liable for the tax is a corporation, at a corporate office in the continental United States, as may be designated by the person liable for the tax, in writing, addressed to the City Treasurer or to some person designated by him. All authorized agents or employees of the City shall have the right at all reasonable times to inspect and examine the books and records of either the amusement or the business enterprise conducting the amusement. Such reasonable times shall include, but not be limited to, Monday through Friday, from 8:00 a.m. to 5:00 p.m.

E. Enforcement. The City Administrator is hereby authorized to develop, adopt and implement such forms and procedures as may be necessary and appropriate to enforce and administer the terms of this Chapter and to collect all monies due to the City.

3-12-3: LICENSE REQUIRED: It shall be unlawful to own or operate a place of amusement for which a tax would be applicable under this Chapter without first having obtained a license to do so or to own or operate a place of amusement which does not comply with the provisions of this Chapter.

3-12-4: APPLICATION FOR LICENSE: An application for a license required from the owner or operator of a place of amusement shall be made to the City Clerk, in writing, signed by the applicant, if an individual, or by a duly authorized agent thereof if a corporation, verified by oath or affidavit. The application shall contain at least the following information:

A. The applicant's name and mailing address.

B. The name and address of the applicant's business if such business was in operation prior to the passage of an ordinance requiring the aforesaid license, or if a proposed business, the name and address of the proposed business.

C. If applicable, the date of the filing of the "assumed name" of the business with the County Clerk.

D. A drawing of the proposed layout of the premises drawn to scale.

E. In case of a partnership or corporation, the date of the formation of the partnership or corporation; in the case of an Illinois corporation, the date of its incorporation; or in the case of a foreign (out-of-state) corporation, the state where it was incorporated and the date of its becoming qualified under the Illinois Business Corporation Act to transact business in the State of Illinois.

F. If the applicant is an owner, the name and address of the proposed operator.

G. If the applicant is an operator, the name and address of the proposed owner.

H. Whether the applicant is an owner or operator of any other places of amusement within the State of Illinois and, if so, the name and address of such other operation.

I. If the place of amusement is not to operate as the principal business at the location, a statement as to the type of business which will be the principal business at the location in question.

J. Whether the applicant is delinquent in the payment of any retailer's occupation tax and, if so, the reasons therefor.

K. The applicant's name, sex, date of birth, social security number, position and percentage of ownership in the business; and the name, sex, date of birth, social security number, position and percentage of ownership in the property if an owner or in the business if an operator or every sole owner, partner, corporate officer, director, manager and any person who owns five percent (5%) or more of the shares of the applicant business entity or parent corporations of the applicant business entity; where the applicant is a corporation or partnership. The answer

to each question relating to this application shall be given with regard to any person who owns or controls an interest of more than five percent (5%) within the partnership or corporation. With respect to any publicly owned corporation or other entities, the requirements of this Subsection K may be met by the furnishing of (1) the latest proxy statement filed by such entity with the Securities Exchange Commission (the "SEC") under the Securities Act of 1934 (the "1934 Act"), (2) a certificate from an officer of such entity indicating any changes in the directors or executive officers of such entity since such proxy statement, and (3) any Form 13(d) relating to changes in beneficial ownership of such entity filed with the SEC under the 1934 Act covering the period subsequent to such proxy statement.

3-12-5: INVESTIGATION FEE: There shall be filed with each application for a license a nonrefundable investigation fee of one hundred dollars ($100.00).

3-12-6: EXAMINATION OF APPLICANT OR LICENSEE: At any time during the pendency of an application or during a license period, the Mayor personally or through the delegation of some other persons who may carry out the function shall have the right to compel the owner or operator to submit to any examination and to produce any books and records which, in the judgment of the person conducting the investigation, are material to the determination of whether the applicant or license holder is qualified to receive or to retain a license under the provisions of this Chapter. The person conducting the investigation shall have the right to require the person being investigated to answer any charges made in any written objection received to the issuance or continuation in force of the license. The failure of any applicant to appear at the time and place fixed by the person conducting the investigation for the examination or a failure to produce books and records as requested, unless for good cause shown, shall be deemed to be

an admission that the applicant is not qualified to receive a license.

3-12-7: DISPLAY OF LICENSE: All licenses required of persons or entities pursuant to this Chapter shall be displayed in a prominent location on the premises, visible to both the public and an enforcement officer of the City.

3-12-8: REVOCATION OR SUSPENSION OF LICENSE: The City Council, upon the recommendation of the Mayor or some person or committee delegated by the Mayor to carry out the functions ascribed to the Mayor pursuant to this Chapter, may revoke or suspend any license issued by the City to an owner or operator hereunder who does not comply with the provisions of this Chapter. If a committee is delegated, the Mayor may serve on the committee. The committee shall determine which member shall write its recommendation to the City Council. Provided, however, that no such license shall be so revoked or suspended except after a public hearing conducted by the Mayor or a designee with not less than a ten (10) day written notice to the licensee affording the licensee an opportunity to appear and defend. After conducting the hearing, the Mayor or designee shall prepare a report summarizing the evidence and making a recommendation to the City Council. The City Council may accept the recommendation of the Mayor or designee or by motion revoke or suspend the license for a period other than that period recommended by the Mayor or designee. In any instance where an alleged violation is the first charge attributable to the premises, the Mayor or designee, after a hearing as provided above and without the need for a consideration of the matter by the City Council, may suspend the license for a period of not to exceed seven (7) days.

3-12-9: PENALTY: In addition to any other remedy provided within this Chapter, the penalty for failure to comply with the provisions of this Chapter shall be not less than twenty five

dollars ($25.00) nor more than one hundred dollars ($100.00), and each day that such failure to comply exists shall be deemed a separate offense.

SECTION THREE: Any policies, resolutions, ordinances or prior agreements relating to the subject matter contained in this Ordinance shall be, and they are hereby, repealed and shall be of no further force and effect.

SECTION FOUR: This Ordinance shall be in full force and effect on and after January 1, 1998, after its passage and approval in the manner provided by law.

PASSED THIS 18th day of February, 1997.

AYES: Ald. Ulery, Siebert, Marzano, Johnston, Eads, Carroll and Brogie

NAYS: Ald. Molnar

ABSENT: None

APPROVED THIS 3rd day of March, 1997.

/s/
MAYOR

ATTEST:

/s/
CITY CLERK - Deputy